

Oil and Gas, Natural Resources, and Energy Journal


Volume 4 | Number 1

May 2018

United States v. Osage Wind, LLC: Wind Energy Being Blown Away by New Rules?

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Recommended Citation

Morgen Potts, *United States v. Osage Wind, LLC: Wind Energy Being Blown Away by New Rules?*, 4 OIL & GAS, NAT. RESOURCES & ENERGY J. 63 (2018),
<https://digitalcommons.law.ou.edu/onej/vol4/iss1/5>

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ONE J

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VOLUME 4

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UNITED STATES V. OSAGE WIND, LLC: WIND ENERGY BEING BLOWN AWAY BY NEW RULES?

MORGEN POTTS*

I. Introduction

When you think of Oklahoma energy, oil and gas comes to mind first. After all, oil and gas has been one of the most important contributing factors to economic growth in Oklahoma throughout the years.¹ Many have become accustomed to the view of a pump jack, or an oil and gas rig when they look out across the prairie. However, over the last few years, wind turbines have been added to that view, which should be no surprise since Oklahoma is “where the wind comes sweeping down the plains.” Oklahoma ranks second in the nation for installed wind capacity, manufacturers turbines for use in and out of state at any of the seven manufacturing plants in the state, and surface lessors collectively receive \$15-20 million annually in lease payments.² Furthermore, the wind industry employs roughly 9,000 Oklahomans and close to a quarter of the state is powered by wind.³ As the

* Morgen Potts is a recent graduate, and now owner of The Potts Law Firm in Norman, Oklahoma. It was an honor being picked to discuss this topic, and I thank Professor Tytanic and the ONE J staff for all their guidance during the writing process.

1. Oklahoma Oil & Gas Association, *Oil and Natural Gas Industry Responsible for Hundreds of Thousands of Jobs in Oklahoma*, (Oct. 20. 2016) <http://okoga.com/oil-and-natural-gas-industry-responsible-for-hundreds-of-thousands-of-jobs-in-oklahoma/>.

2. Oklahoma Wind Energy, <http://awea.files.cms-plus.com/FileDownloads/pdfs/Oklahoma.pdf>.

3. *Id.*

population becomes increasingly concerned with the consumption of fossil fuels, and more invested in renewable energy, we will likely see wind industry employment, income from wind turbines, and the number of turbines continue to rise in Oklahoma.

Wind energy and the laws pertaining to it remain in their infancy in Oklahoma; even with Oklahoma ranked second in the nation for installed wind capacity. Most people know that the surface estate can be severed from the mineral estate. But what about the rights to the wind? Can those be severed? The majority of states have not answered this question, and this paper does not intend to answer that question. For now, Oklahoma still treats wind as part of the surface estate.⁴ The Airspace Severance Restriction Act (ASRA) prohibits severing the airspace above any real property for the purpose of commercial wind development.⁵ ASRA clarifies further and requires that leasing arrangements for the wind can only be made with the legal owner of the surface.⁶ Therefore, wind operators lease the surface rights when they seek to install one turbine, or an entire wind farm. It appears landowners, like the Oklahoma Cattlemen's Association, would like to see legislation passed that allows the severance of the wind estate.⁷ However, allowing landowners to sever the wind estate could cause problems. Would the mineral estate still be considered the dominant estate? Would a wind lease still run with the land as it does now?⁸ If legislation allowed landowners to sever the wind estate, landowners would have more opportunities to lease and receive royalties.⁹ But what if wind companies had to lease the surface and the mineral rights to be able to install a wind turbine? This note addresses that very situation and discusses what activities Osage Wind conducted that required a mineral lease in addition to a surface lease from the Osage Nation.

4. OKLA. STAT. ANN. tit. 60 § 820.1 (West 2017).

5. *Id.*

6. *Id.*

7. Joe Wertz, *Ranchers Might Push Law Makers to Give Wind and Solar Same Property Rights as Oil and Gas*, STATEIMPACT (July 25, 2016, 11:54 AM) <https://stateimpact.npr.org/oklahoma/2016/07/25/ranchers-might-push-lawmakers-to-give-wind-and-solar-same-property-rights-as-oil-and-gas/>.

8. § 820.1

9. *Id.*

II. Law before the case

A. Canons of Construction

To interpret a statute, or other legal document, courts follow canons of construction.¹⁰ In addition to general constructional canons, specific canons of construction must be followed when it comes to regulations involving Native Americans. In the event of a passage of an ambiguous statute, enacted for the benefit of Native Americans, it must be construed liberally in the Native Americans' favor.¹¹ These canons originally formed to aid in interpreting treaties between the United States and Native American tribes.¹² The basis for the canons, voiced by the Supreme Court of the United States, was the disadvantaged bargaining power of the Native Americans.¹³ Because Native Americans were believed to be weak minded, dependent, and uneducated in legal terminology, the Court believed that treaties, and later statutes, should be interpreted in a way the Native Americans could understand.¹⁴ As time progressed, the justification for the canons became more about the fiduciary relationship between the United States and the tribes, and less about unequal bargaining power.¹⁵ Since the tribes were the wards of the United States, fairness dictated that statutes and treaties be construed in favor of the Native Americans.¹⁶ Construing statutes in favor of Native Americans in the face of ambiguity played a part in the present case and determining whether Osage Wind conducted mining activities during installation of its wind turbines.¹⁷

B. Allotment Legislation

In 1887, Congress enacted the General Allotment Act ("GAA"), also known as the Dawes Act after senator Henry Dawes.¹⁸ When the Secretary

10. James J. Brundey & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 7 (2005) (defining canons of construction as "background norms and conventions that are used by courts when interpreting statutes").

11. *Millsap v. Andrus*, 717 F.2d 1326, 1329 (10th Cir. 1983) (citing *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)).

12. *Worcester v. Georgia*, 31 U.S. 515, 582 (1832) (M'Lean, J., concurring).

13. *Jones v. Meehan*, 175 U.S. 1, 5 (1899).

14. *Id.*

15. David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 42 (1999).

16. *Id.*

17. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1090 (10th Cir. 2017).

18. Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 616 (2011).

of Interior (“Secretary”) believed it advantageous to “allot” portions of reservation land to individual tribe members, the GAA gave him the authority to do so.¹⁹ In theory, private ownership of land was akin to citizenship, and would provide the Native Americans with a reason to cultivate land and stay in one place.²⁰ Basically, legislators hoped that Native Americans would begin to live their lives more like white settlers, and less like Native Americans. On occasion, the agency superintendent allowed Native Americans to choose how many acres they wanted to be allotted; typically, between 40 and 160 acres.²¹ However, other times the agency superintendent assigned the allotments.²² After authorities completed allotment, the federal government purchased the remaining land and sold it to non-Native American settlers.²³

Although it may appear as though the Native Americans held title to their allotments like a typical homesteader, they did not. The government believed the Native Americans were incompetent, and unable to manage their own lands. Therefore, the government placed the allotments in a trust, with the United States as trustee, for a period of twenty-five years.²⁴ This process meant that unlike typical settlers who had complete fee simple ownership of their land, Native Americans could not freely sell or lease their allotment because the government held legal title. At the expiration of that term, in theory, the government would remove the allotment from the trust, and present the Native American with a fee patent for the land.²⁵ However, in 1906 the Burke Act (“Burke”) amended the GAA. After the expiration of the twenty-five years, the Secretary would evaluate the Native American’s competency to determine if he should receive his fee patent.²⁶ Not surprisingly, many Native Americans did not receive their fee patent at the expiration of that term, and their land remained subject to the jurisdiction the United States.²⁷ Furthermore, this Act gave the Secretary

19. 25 U.S.C.A. § 348 (West 2017).

20. Indian Land Tenure Foundation, <http://iltf.org/land-issues/history/> (last visited Oct. 19, 2017).

21. *Id.*

22. *Id.*

23. Conference of Western Attorneys General, American Indian Law Deskbook § 1:9. The General Allotment Act Period: 1887 to 1934 (2017); Native American ownership went from 138 million acres in 1887 to roughly 34 million in 1934.

24. 25 U.S.C.A. § 348 (West 2017).

25. *Id.*

26. *Id.* at § 349.

27. *Id.*

discretion in determining the heirs of a deceased allottee.²⁸ If an allottee died before the expiration of the twenty-five years, the allotment would be cancelled and would revert back to the United States. If the Secretary deemed them competent to manage the land, the Secretary would then make a determination of heirs of the allottee and issue them a fee patent for the allotment.²⁹ Or, if deemed incompetent, the Secretary would sell the allotment, and provide the heirs with the proceeds.³⁰

While the GAA and its amendments applied to most tribes, they did not, apply to the Osage.³¹ However, allotment legislation did affect the Osage; just not until 1906, when the Osage Allotment Act (“OAA”) was passed by Congress.³² The OAA, like the ones before it, focused on dismantling the Native American way of life. Under the OAA, the Osage tribal government dissolved, and Congress acquired the power to determine the tribe’s membership criteria.³³ Furthermore, the OAA severed the reservation’s mineral estate from the surface estate, and placed the mineral estate in trust, with the United States as trustee, and with the Osage Nation retaining beneficial ownership.³⁴ The surface estate was allotted to tribal members and made freely alienable once the mineral estate was severed and placed in trust. The OAA empowered the Osage Nation to lease their minerals, but with the United States as trustee, the leases had to be approved by the Department of the Interior (“DOI”).³⁵ A provision in the OAA limited Osage membership to only those who had a share in the mineral estate, with these shares called headrights.³⁶ Members with headrights had the opportunity to receive trust funds from mineral income, and to receive bonuses and royalties.³⁷

In the beginning, the royalty checks the Osage received amounted to only a few dollars. But every year the payments increased as more

28. *Id.* at § 372.

29. *Id.*

30. *Id.*

31. *Id.* at § 353.

32. Micah T. Zomer, *Returning Sovereignty to the Osage Nation: A Legislative Remedy Allowing the Osage to Determine their Own Membership and System of Government*, 32 AM. INDIAN L. REV. 257, 257 (2007).

33. *Id.*

34. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1082 (10th Cir. 2017).

35. *Id.*

36. Zomer, *supra* note 32, at 257.

37. *Id.*

prospectors realized the vast amount of oil under Osage land.³⁸ By the 1920s, the Osage were the wealthiest people per capita in the world.³⁹ In 1923 alone, oil earned them 30 million dollars.⁴⁰ Sadly, this wealth amounted to tragedy for the Osage. The Osage were targeted for their wealth, and many ended up dead at the hands of spouses that wanted nothing more than to inherit their headrights.⁴¹ Today the death toll is still unknown due to inaccurate counting methods in the 1920s.⁴² But between 1907 and 1923, roughly 605 Osage died.⁴³ That averages to thirty-eight per year.⁴⁴ Strangely, the Osage had a higher death rate than Caucasians, which should not have been the case due to the Osage's higher standard of living.⁴⁵ However, even in the face of tragedy, the Osage have proven their resilience and continue to prosper today.

C. Code of Federal Regulations

The DOI has promulgated several regulations pertinent to *Osage Wind*. First, section 211.3 of the Code of Federal Regulations governs the development of Native American resources, and provides the relevant definition of "mining."⁴⁶ Secondly, sections 214.7 and 226 implement the OAA and apply specifically to the Osage mineral estate.⁴⁷

Section 214.7 dictates that "no mining or work of any nature will be permitted upon any tract of land until a lease covering such tract shall have been approved by the Secretary of the Interior and delivered to the lessee."⁴⁸ As mentioned above, the mineral estate remains in trust, with the United States as trustee. Therefore, mining on Native American land, without the approval of the Secretary, as *Osage Wind* did, likely will result in a lawsuit. Furthermore, this regulation limits mineral leases to 160 acres.⁴⁹ According to this regulation, *Osage Wind* would have to secure 525

38. David Grann, *Killers of the Flower Moon: The Osage Murders and the Birth of the FBI* 6 (1st ed. 2017).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 283.

43. *Id.*

44. *Id.*

45. *Id.*

46. 25 C.F.R. § 211.3 (West 2017).

47. *Id.* at §§ 214.7, 226.

48. *Id.* at § 214.7.

49. *Id.*

mineral leases to cover the 84,000 surface acres it leased for the purpose of constructing its wind farm.

Being that federal land is at the heart of the controversy, the court turned to Section 211.3 of the Code of Federal Regulations for guidance, because that section defines what constitutes “mining” on federal land. This part reads, “mining means the science, technique, and business of *mineral development*” Furthermore, the enterprise will be considered mining if the extraction of minerals exceeds 5,000 cubic yards in a given year.⁵⁰ Although, when it comes to wind farms, this regulation does not apply to each individual turbine. Instead, it applies to the project as a whole if it is “unified by proximity of time, space and purpose.”⁵¹ Since the wind farm the Osage are constructing will contain eighty-four turbines, more than 5,000 cubic yards will be excavated, and the exception will not apply.⁵² This definition lacked interpretive guidance in case law, so the Tenth Circuit took the opportunity to further expand upon the meaning of “mineral development” to help determine activities that constitute mining and trigger the lease requirement. Osage Wind asserted that because their activities did not include commercial mining, this regulation did not apply to them. However, the Tenth Circuit, overturning the trial court, held that the mining did not have to be commercial for it to trigger this regulation.

III. Statement of the case

A. Facts

In 2010, Osage Wind leased 84,000 acres of the surface estate in Osage County, Oklahoma.⁵³ Osage Wind leased this land so they could construct a commercial wind farm that would contain eighty-four wind turbines.⁵⁴ In September 2011, the Osage Mineral Council (“OMC”) became concerned that the surface activities of Osage Wind would deprive oil and gas lessees of reasonable use of the surface estate.⁵⁵ However, OMC lost this battle because it produced no evidence that the activities of the lessees conflicted with the activities of Osage Wind.⁵⁶ By 2013, Osage Wind had begun road construction for the project, and in 2014, excavation work for the turbines

50. *Id.* at § 211.3.

51. *United States v. Osage Wind, LLC*, 871 F.3d 1078, 1093 n.9 (10th Cir. 2017).

52. *Id.* at 1089.

53. *Id.* at 1083.

54. *Id.*

55. *Id.*

56. *Id.*

began.⁵⁷ Each turbine required a cement foundation that was ten feet deep, and up to sixty feet in diameter.⁵⁸ To meet the requirements for these foundations, Osage Wind had to excavate some dirt. The process included the excavation of soil, sand, and rock. Osage Wind crushed rocks smaller than three feet, so they could be pushed back over the hole once the foundation had been poured and cured: placing larger rocks next to the hole from which they came.⁵⁹ Herein lies the controversy. The United States filed suit under the belief that the excavation work performed by Osage Wind constituted mining, and therefore, required Osage Wind to secure a mining permit.⁶⁰

B. Procedural History

In November 2014, the United States filed suit requesting an injunction to prevent Osage Wind from continuing work on the project until it had secured a mineral lease.⁶¹ However, once the United States realized that Osage Wind had completed its excavation work, it amended its complaint to seek damages in lieu of an injunction.⁶² In September 2015, the district court granted summary judgment in favor of Osage Wind, holding that Osage Wind's excavation work did not constitute mining under the applicable regulation.⁶³ After the grant of summary judgment, the United States had sixty days to appeal.⁶⁴ On the last day to appeal, the United States informed OMC that it had no intentions of appealing the decision.⁶⁵ OMC wanted to protect its interest, so it filed a motion to intervene as a matter of right and a notice of appeal from the summary judgment order filed against the United States.⁶⁶ In February 2016, the district court denied the motion to intervene due to lack of jurisdiction and OMC appealed to this court.⁶⁷

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1083–84.

61. *Id.* at 1083.

62. *Id.*

63. *Id.* at 1084.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

IV. Decision

Even though it had not appealed at the district court level, the Tenth Circuit concluded that OMC could appeal the summary judgment award, and that *res judicata* did not preclude the OMC's claim. Furthermore, the court held that the *de minimis* exception in the regulation did not apply because the entire wind farm project required excavation of more than 5,000 cubic yards of dirt. Lastly, the court concluded that the definition of "mining" in the federal regulation did not limit "mining" to only commercial mining, and that Osage Wind's excavation activities constituted "mining" and required a mineral lease.⁶⁸

A. Right to Appeal

Because the United States originally brought this lawsuit as trustee for the Osage Nation, OMC did not participate in the lawsuit at the trial court level.⁶⁹ OMC did not join the lawsuit because it believed, at first, that the United States was adequately protecting its interest.⁷⁰ However, when the United States failed to appeal the district court's decision, OMC knew it had to take action to protect it, and the Osage Tribe's interests. Therefore, it filed the motion to intervene and the notice of appeal. As stated above, the trial court denied said motion.⁷¹ Traditionally, only parties to a lawsuit may appeal a judgment.⁷² However, there is an exception that allows non-parties to appeal if they have a "unique interest" in the subject matter of the case.⁷³ The Osage Nation, acting through OMC, own the beneficial interest in the mineral estate that Osage Wind excavated.⁷⁴ The intervention denial of the district court effectively sidelined OMC and prevented them from protecting their own interest. Even though OMC waited until the sixtieth day to intervene and appeal, it did so only because the United States chose to wait until the last minute to inform it that it would not be seeking an appeal. The United States had adequately been representing OMC's interest. So, even if OMC had attempted to intervene earlier, its motion would have been denied.⁷⁵ However, the courts limited the "unique interest" exception so that it cannot be used when someone only has a

68. *Id.*

69. *Id.*

70. *Id.* at 1085.

71. *Id.* at 1084.

72. *Id.*

73. *Id.*

74. *Id.* at 1086.

75. *Id.*

general interest. In conclusion, because OMC is a proper party to the merits appeal due to its unique interest, this court does not need to decide if it properly intervened.⁷⁶

B. Res Judicata

Res judicata, or claim preclusion, prevents a party from relitigating an issue if there was a final judgment on the merits in a previous lawsuit where the issue was or could have been litigated.⁷⁷ In 2011, OMC filed suit against Osage Wind because it believed that Osage Wind's activities would interfere with the surface rights of oil and gas lessees.⁷⁸ However, OMC lost on the merits of that case because it produced no evidence that Osage Wind's surface activities directly conflicted with the surface activities of the lessees.⁷⁹ Even though OMC filed a previous lawsuit against Osage Wind, that lawsuit occurred during the beginning stages of the wind project, and at that time OMC had no way of knowing the magnitude of the planned excavation work.⁸⁰ Therefore, OMC could not have litigated the current issue during that lawsuit, and res judicata does not prevent it from litigating it here.⁸¹

C. Whether Osage Wind's Excavations Constituted Mining

"Mining means the science, technique, and business of mineral development including, but not limited to: opencast work, underground work, and in-situ leaching directed to severance and treatment of minerals; . . ."⁸² Furthermore, the excavations will not be considered mining if the lessee extracts less than 5,000 cubic yards in a given year.⁸³ The district court granted summary judgment in favor of Osage Wind because it believed that section 211.3 only applied if the surface lessor "commercially" mined the minerals.⁸⁴ However, this court determined that the definition did not turn on commercialism. In fact, they believed it turned on the meaning of the phrase "mineral development" found in the regulation.⁸⁵ It is important to remember that an ambiguous law intended to

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1087.

81. *Id.*

82. 25 C.F.R. § 211.3 (West 2017).

83. *Id.*

84. *Osage Wind, LLC*, 871 F.3d at 1089.

85. *Id.* at 1090.

be beneficial for the Native Americans, ought to be liberally construed in the Native Americans' favor.⁸⁶ The regulations at issue are designed to protect the Native Americans' mineral interest, and therefore, must be construed in their favor.⁸⁷

While this court disagrees with the district court's conclusion that the above regulation only applies to commercial development of minerals, this court did not state that commercial development of minerals does not constitute mining under the regulation.⁸⁸ Merely, the Tenth Circuit explained mining can occur with or without minerals being commercially developed.⁸⁹ It asserts that the term "development" can be defined as making something available or usable, when previously it had only potentially been available or usable.⁹⁰ So the question became whether Osage Wind's excavation activities, that included sorting and crushing smaller rocks to use as backfilling and support for the wind turbines, constituted "mineral development."⁹¹ Because the regulation does not further define "mineral development," this court looked to the examples in the regulation-opencast work, underground work, and in-situ leaching-for guidance.⁹² This court suggests that in light of the examples, the definition of mineral development includes "action upon the minerals in order to exploit the minerals themselves."⁹³ This court concedes that the district court reasonably interpreted the federal regulation, but in light of the ambiguity, the canons of construction require the regulation to be construed in favor of the Native Americans.⁹⁴ However, this court did agree with Osage Wind's assertion that merely disrupting the surface should not constitute mining.⁹⁵ In no sense does "mineral development" simply mean the removal of dirt from the earth.⁹⁶ The surface lessor must go further, as did Osage Wind in this case.⁹⁷ Osage Wind did not merely relocate dirt so it could construct the foundations for the wind turbines. On the contrary, Osage Wind excavated soil, sand, and rock, and then crushed the smaller

86. *Id.* (citing *Millsap v. Andrus*, 717 F.2d 1326, 1329 (10th Cir. 1983)).

87. *Id.*

88. *Id.* at 1090.

89. *Id.* at 1089.

90. *Id.*

91. *Id.*

92. *Id.* at 1090–91.

93. *Id.* at 1091.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

pieces of rock so they could be used for backfilling the holes for the foundation.⁹⁸ Then, once the holes had been refilled, Osage Wind placed the bigger pieces of rock adjacent to the hole from which they came to add more support.⁹⁹ Therefore, Osage Wind did not merely remove dirt from the earth as they would like this court to believe. They exploited the minerals so they could work to their advantage in adding more structural support for the wind turbines.¹⁰⁰ By acting upon the minerals by altering their natural size to use them to its advantage, Osage Wind developed the minerals in a way that constituted mining under section 211.3.¹⁰¹

Osage Wind attempted to argue that this interpretation of the regulation violated the Osage Act because it restricts the surface fee owners “right to manage, control, and dispose of his or her lands the same any citizen of the United States.”¹⁰² However, this court quickly rebuked this weak argument by reminding Osage Wind that mere disruption of the mineral estate does not constitute mining under section 211.3.¹⁰³ Due to the exception mentioned above in section 211.3, any use of common-variety minerals that amounts to less than 5,000 cubic yards will not trigger the need to have a federally approved mineral lease.¹⁰⁴ Therefore, the surface fee owners retain the unobstructed right to use their land, unless they seek to develop more than 5,000 cubic yards of minerals. For that reason, the interpretation of §211.3 does not violate the Osage Act because the interpretation does not hinder the free use of the surface estate by the Osage.¹⁰⁵

V. Analysis

In *United States v. Osage Wind*, the court further defined “mining” under section 211.3 of the Code of Federal Regulations. The Tenth Circuit determined that an operator did not have to be *commercially* mining, for its operations to be considered “mining” under the pertinent federal regulation. Similarly, many states have not included the prerequisite of commercialism

98. *Id.*

99. *Id.*

100. *Id.* at 1091–92.

101. *Id.* at 1092.

102. *Id.*

103. *Id.* (for instance digging a hole for a swimming pool or basement would not be mining).

104. *Id.*

105. *Id.*

within their mining statutes.¹⁰⁶ The federal regulation in question also does not include commercialism as a prerequisite for mining. In fact, the regulation never even mentions commercialism. For this reason, the Tenth Circuit reached the correct conclusion that Osage Wind did not have to be commercially mining for the mineral lease requirement to be triggered. Commercialism should not be dispositive when the word never even makes an appearance in the statute.

However, from a policy standpoint, now requiring commercialism could prove difficult. Requiring that mining be done commercially before requiring a mineral lease, would make for a more bright line rule that courts and wind operators could more easily follow. Now courts will have to determine, on a case by case basis, whether an operator's activities constituted mineral development within the Tenth Circuit's newly crafted definition. Furthermore, operators will have to determine if their activities will constitute mineral development within the definition before they begin their operations, so as to avoid Native Americans bringing suit.

Unfortunately for wind operators, the Tenth Circuit's decision appears to mean that they will have to secure, not only a surface lease, but also a mineral lease when operating on federal land. Another option would be to buy the land outright. However, why do that when they could likely find another site for the wind farm that will not be on federal land.¹⁰⁷ While the Tenth Circuit's final interpretation of the pertinent federal regulations was correct, I cannot help but feel bad for wind operators. The court concluded their opinion without much needed explanation. Will wind operators actually need to secure a surface and a mineral lease in the future? Or, can they secure only the mineral lease, and use the surface as an oil and gas lessee would be able to?¹⁰⁸ What if the surface estate has yet to be leased, but the mineral estate is leased? According to the rule *ejusdem generis*, when contracting parties make use of specific terms in a lease, for example "oil and gas," and then follow those terms with "and all other minerals,"

106. COLO. REV. STAT. § 34-32-103 (West 2017); UTAH CODE ANN. § 40-8-4 (West 2017); tit. 52 PA. STAT. AND CONS. STAT. ANN. § 3303 (West 2017); NEV. REV. STAT. ANN. § 519A.080 (West 2017).

107. Carol Hardy Vincent, Laura A. Hanson & Carla N. Argueta, *Federal Land Ownership: Overview and Data*, Federation of American Scientists, <https://fas.org/sgp/crs/misc/R42346.pdf> (March 3, 2017) (1.6% of Oklahoma is federally owned for a total of 700,996 acres).

108. *Haupt, Inc. v. Tarrant County Water Control & Improvement Dist. No. One*, 870 S.W.2d 350, 353 (Tex. App. 1994) (explaining that ownership of the mineral estate impliedly includes the right to reasonable use of the surface estate.).

only minerals of the same kind of species as oil and gas are included in said phrase.¹⁰⁹ Therefore, wind companies will have to examine each individual lease when determining if the mineral estate is unavailable for leasing for the purpose of constructing a wind farm. This process seems a bit taxing.

Obviously, a commercial wind farm takes up more square footage than an oil rig, and can remain on the land longer than an oil rig. Would the amount of wind turbines on the surface still be considered reasonable use of said surface? These are complicated questions that this paper does not seek to address; this paper only seeks to shed light on the complicated questions that someone soon will have to answer.

Furthermore, the court really stressed that simple disruption of the minerals will not trigger the requirement for a mineral lease. The operator needs to go further and actually develop the minerals in some way. The court went on to explain how Osage Wind did not simply disrupt the minerals, but developed them for its own use when it crushed and sorted them for backfilling. This leaves another question unanswered. If Osage Wind had not crushed and sorted the rocks, but had simply backfilled the holes with the excavated minerals in their original form, would that be considered mining? The court does mention that offsite relocation of minerals constitutes mining, but what if Osage Wind had left the extracted minerals on the premises, and then backfilled the holes with dirt it had brought in from another site? Is that still considered mining? Yet another question that this paper does not attempt to answer, only bring to light.

Also, by requiring operators to obtain a surface and mineral lease before a wind turbine may be constructed, the Tenth Circuit could have inadvertently created a domino effect that will lead to a downturn in renewable energy in Oklahoma. Oklahoma is ranked third in the nation for installed wind capacity, and the Tenth Circuit's decision could compromise that ranking by making it more difficult for wind operators to construct wind farms on federal land. While the Tenth Circuit's decision is not binding on trial courts outside of Oklahoma, other courts will look to the Tenth Circuit's decision for guidance when handling the federal land in their state.

A progressive move that law makers could take would be to allow property owners to sever the rights to the wind. Then allow wind lessees to utilize the surface estate in the same manner as oil and gas lessees. This

109. *Cronkhite v. Falkenstein*, 1960 OK 118, 352 P.2d 396, 399 (Okla. 1960); *See, e.g., Vogel v. Cobb*, 193 OK 64, 141 P.2d 276, 277 (Okla. 1943) (holding that water is not included in a mineral deed conveying oil, petroleum, gas, coal, asphalt, and all other minerals).

severance would prevent wind companies from having to secure a mineral and surface lease and would answer the question of how to handle the surface estate. Questions like which estate is the dominant estate would still need to be cleared up, but the main problem would be fixed.

VI. Conclusion

Wind energy and the laws pertaining to it are still in their infancy. Due to the Airspace Severance Restriction Act, wind operators have been leasing only the surface rights when they desire to construct a wind farm. In the future, it appears they will continue this practice unless they are dealing with federal land. However, for wind operators (or anyone for that matter) who desires to construct a wind farm on federal land, many questions need to be answered; will they have to secure a surface and mineral lease? Or will a mineral lease suffice? What if the minerals have already been leased? Will they be able to skirt the regulation by backfilling with the minerals still in their original form, or by backfilling with dirt brought in from a separate location? Once these questions are answered operators will be able to decide if they want to continue leasing federal land, but until then, I would not be surprised to see a downturn in leasing of federal land. This effect could lead to a slump in renewable energy in Oklahoma. The Tenth Circuit made the best out of a poorly worded federal regulation. However, the final result will likely lead to confusion, more lawsuits, and a downturn in leasing of federal land.